Home Insulation Service, a Division of Sunstate Wholesalers *and* International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO. Case 12-CA-8653

March 26, 1981

DECISION AND ORDER

On September 26, 1980, Administrative Law Judge John M. Dyer issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

In his Decision, the Administrative Law Judge concluded that Respondent had not unlawfully refused to offer reinstatement to its striking employees, as the relevant reinstatement offers, "insofar as Respondent was aware," were conditional on the reinstatement of two employees who had been previously lawfully discharged. In the absence of any unconditional offer by or on behalf of these economic strikers to return to work, he found that Respondent had not violated Section 8(a)(3) by its refusal to reinstate them. Based on the facts and for the reasons stated below, we reverse these conclusions of the Administrative Law Judge and find that Respondent has violated Section 8(a)(3) and (1) of the Act, as alleged.

Respondent sells and installs building insulation, and operates eight branch offices located in Florida, including one in Tampa, the situs of the present dispute. A majority of the Tampa production and maintenance employees participated in a union organizing drive and signed union authorization cards in May 1979,[2] prior to the events herein. On Friday, May 25, employee Palmer, who had participated in the organizing campaign, had a dispute with Tampa Branch Manager McMullan, as a result of which he was lawfully discharged. In response, the eight employees who were present struck in protest of Palmer's discharge. Employee Veenstra, who arrived for work late that day, was also lawfully terminated.[3]

Apparently, except for employees who had already been dispatched, no insulation installation was performed by the Tampa employees that day. Respondent attempted to contact customers scheduled for that day to let them know of the strike, and to assure them that Respondent would try to complete the scheduled work over the weekend. On the following day, Saturday, Respondent resumed operations, using its salesmen and employees from other branches. McMullan testified that he was at the Tampa branch office on Saturday from 7:30 a.m. to 8 p.m., and that Frank Copare, Respondent's vice president, was there from 8 a.m. to 7:30 p.m. The record indicates that a large number of applicants to replace the strikers were interviewed that day, either by McMullan or by Copare. The record further shows that Copare was at work in the office the following morning, and that McMullan was there from 11:15 a.m. to 5 p.m. The record does not indicate what they did while there. However, the Administrative Law Judge discredited testimony that applicants were interviewed that day. On Monday, May 28, the bulk of the replacements reported for work. The remaining replacements reported later in the week.

According to unrefuted testimony, the striking employees met with William Langford, business manager for the Charging Party Union, on Friday, May 25, and he instructed them to be ready to return to work on Monday, whether Respondent took Palmer back or not. On the next morning, Saturday, Langford telephoned Respondent about 9 o'clock and again about 11 o'clock, identified himself as the Union's business manager, and unsuccessfully requested to speak to Jim English, Respondent's president. On the third attempt, at 1 p.m., he was informed that English was not accepting any calls. In response, Langford requested to leave a message for English, testifying:

> I told her to tell Mr. English that the men would be there Monday morning dressed and ready to go to work prior to the regular work time.

Later that evening, Langford also sent Respondent a mailgram and a telegram which included statements that the employees would be ready to return to work at the normal time on the following Monday.[4] The telegram was not received until late

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Unless otherwise indicated, all dates are 1979.

[3] The Regional Director specifically refused to include the discharges of Palmer and Veenstra in the present proceeding, as he concluded that they were lawfully discharged. This decision has not been appealed.

[4] The entire mailgram and telegram both stated:

Continued

Monday morning, and the mailgram was received on Tuesday.

According to the credited testimony, striking employee Montemurro also called Branch Manager McMullan around 9 p.m. on Saturday and told him that all 14 of the striking employees would be at work on Monday.[5] When McMullan inquired whether "all 14" included Veenstra and Palmer, Montemurro replied, "All 14."

On Monday, prior to 7 a.m., the striking employees as well as dischargees Palmer and Veenstra presented themselves ready for work at the normal starting time. They were not allowed to return.

It is well established that a union may make a collective offer on behalf of all striking employes for their return to work.[6] Accordingly, the Union's business manager, Langford, had the authority to make such an offer to return, particularly in view of his prior discussion with the striking employees on Friday, May 25. On Saturday, May 26, he repeatedly attempted to contact Respondent's president, English, but was finally informed that English was not taking any calls. Uncontradicted evidence reveals, however, that he left a message for English indicating that the men would be ready for work at the start of the next regular workday. This message was telephoned to Respondent's workplace and received by an apparent agent of Respondent for the purpose of transmitting such message to English. Despite repeated telephone calls, English had not made himself accessible to Langford, and he did not thereafter contact him.[7] On its face, the message clearly reveals that an unconditional offer to return was being made.

However, the Administrative Law Judge improperly interpreted this message in light of subsequent communications with Respondent, including the mailgram and telegram received *after* the strikers had been denied reinstatement. In any event, these subsequent communications are insufficient to indicate that the Union never intended to make an unconditional offer of return to work, or that its initial unconditional offer later became conditional. On Friday, Langford instructed the strikers to return, even if Palmer's discharge was not retracted. Montemurro's statement to McMullan indicating that dischargees Veenstra and Palmer would also try to return to work on Monday is fully consistent with Langford's earlier unconditional offer for the men's return.[8] Respondent received no other communication from the strikers or the Union prior to their attempted return to work, and Respondent's subsequent receipt of the telegram and the mailgram did not serve as a retraction of the earlier offers. At most, the various communications rendered ambiguous the offers to return. However, at no time did Respondent attempt to reach Langford or Montemurro to obtain clarification of the offers sufficient to determine whether they were in fact conditional. Where any such ambiguity remains unclarified due to Respondent's decision to ignore the offers and not seek clarification, Respondent may not be heard to complain if such uncertainty is resolved against its interest. *Haddon House Food Products, Inc. and Flavor Delight, Inc.*, 242 NLRB 1057, fn. 6 (1979).

In view of the above, we find that the General Counsel has established a *prima facie* showing that the striking employees were entitled to reinstatement at the time Langford offered their return at or about 1 p.m. on Saturday, May 26.

In such a situation, Respondent's refusal to reinstate them may be found to be lawful only if it has presented evidence showing that there were no positions available for them to fill at the time the offer to return was made.[9] The Supreme Court in *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378–379 (1967), has succinctly summarized the controlling principles:

A majority of production and maintenance employees at the Tampa Branch excluding office clerical employees and supervisors have authorized and designated Heat and Frost Local 67 of the Asbestos Workers International Union as their collective bargaining representative. Branch Manager Charles McMullen [sic] was so informed and recognition of the Union was demanded on Friday May 25. Such demand is herewith renewed and you are advised it is a continuing demand and a meeting for commencement of negotiation on a collective bargaining agreement is requested. Please let me know the time date and place for the commencement negotiation. Additionally reinstatements and reimbursements for their lost earnings is demanded for the employees locked out on May 25. All employees will report for work and be ready to work at the normal time of 7 AM on Monday May 28.

[5] Respondent's regular work force on May 25 included about 14 production and maintenance employees at Tampa. As noted above, only eight of these employees participated in the strike which commenced that day.

[6] *Colonial Haven Nursing Home, Inc.*, 218 NLRB 1007, 1011 (1975).

[7] In his testimony, English did not deny that he was present at his office on May 26.

[8] Where reinstatement offers are made regarding "all striking employees," "the members," and similar collective designations or lists of employees, this Board does not infer that the reinstatement of one is conditional on the reinstatement of all. See *Pepsi-Cola Bottling Company of Mason City, Iowa*, 251 NLRB 187 (1980); *Richard C. Knight Insurance Agency, Inc.*, 243 NLRB 604 (1979); *Woodlawn Hospital*, 233 NLRB 782 (1977); *Coca Cola Bottling Works, Inc.*, 186 NLRB 1050 (1970), modified on other grounds 466 F.2d 380 (D.C. Cir. 1972). While Montemurro specifically stated that Palmer and Veenstra would try to return to work, he did not state that the others would *not* return without these two. But compare *Times Herald Printing Company*, 221 NLRB 225 (1975), where the offer to return was expressly conditioned on reinstatement of all strikers.

[9] We reject the General Counsel's argument that striker replacement applicants who have accepted offers of employment, but who have not yet reported for work, are not considered striker replacements. Such applicants obtain the status of striker replacement upon their acceptance of offers of permanent employment. See *H. & F. Binch Co. Plant of the Native Laces and Textile Division of Indian Head, Inc.*, 188 NLRB 720 (1971), enfd. 456 F.2d 357 (2d Cir. 1972); *Superior National Bank & Trust Company*, 246 NLRB 721 (1979).

> If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by Sections 7 and 13 of the Act. Under Section 8(a)(1) and (3) it is an unfair labor practice to interfere with the exercise of these rights. Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to "legitimate and substantial business justifications," he is guilty of an unfair labor practice. *N.L.R.B.* v. *Great Dane Trailers*, 388 U.S. 26, 34 (1967). The burden of proving justification is on the employer. . . .
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> In some situations, "legitimate and substantial business justifications" for refusing to reinstate employees who engaged in an economic strike have been recognized. One is when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations.

Under this standard, the evidence is insufficient to show that any permanent replacements were hired prior to Langford's 1 p.m. telephone call. The credited evidence indicates only that the replacements were interviewed and apparently hired sometime Saturday, May 26. Although Respondent may have hired some replacements prior to the Langford telephone call, it has not presented affirmative evidence that any such employees were hired prior to that time. Therefore, Respondent has failed to meet its burden to rebut the General Counsel's *prima facie* case. See *Los Angeles Chemical Company*, 204 NLRB 245, 250 (1973). Accordingly, we find that Respondent violated Section 8(a)(3) and (1) of the Act when it refused to reinstate the returning strikers when they arrived for work on Monday, May 28, and that the strike was thereupon converted to an unfair labor practice strike.

The General Counsel further alleges that Respondent violated Section 8(a)(5) and (1) of the Act by its refusal to bargain with the Union after the Union's demand for recognition contained in the telegram was received on Monday, May 28.[10] This demand for recognition was for a unit limited to the Tampa employees. For the reasons stated below, we agree with the Administrative Law Judge's conclusion that the 8(a)(5) and (1) allegations be dismissed.

As previously stated, Respondent operates its business from eight locations in Florida, including Tampa, Clearwater, Lakeland, Dade City, Sarasota, Ocala, Orlando, and Tallahassee. They range in distance from approximately 20 to 250 miles from Tampa, with the majority being within 75 miles of Tampa. While the parties agree that a production and maintenance unit is appropriate, the General Counsel asserts that the scope of such an appropriate unit need contain only those employees at Tampa, for whom recognition has been demanded, while Respondent claims that the appropriate unit must include all such employees at all of its branches.

Excluding Palmer and Veenstra, the record indicates that 10 employees signed authorization cards prior to the strike on May 25. The record also indicates that the normal work complement at Tampa consisted of approximately 15 production and maintenance employees,[11] and that approximately 20 other such employees worked out of the remaining branches. Respondent's operation requires that its branch employees transport insulation equipment and materials from the branches to various construction sites and existing buildings where the actual insulation work is to be performed. Respondent's president, English, testified that none of the branches operates within precise geographical boundaries, but that an attempt is made to have the branch nearest the work perform the job. This effort to coordinate the work assignments among the branches is performed by a branch dispatcher located in Tampa. Due to work overloads, equipment breakdowns, and other causes, employees from the nearest branch are not always able to perform the work alone, and approximately 25 percent of the jobs require employees from more than one branch to perform the work. The equipment for the installation of urethane foam insulation, and the mechanic who operates this equipment, is stationed only at the Tampa branch. This employee works outside the Tampa area approximately 2 days each week. In addition, employees are transferred on a weekly basis to other branches for training purposes.

English further testified that employees at the various branches are paid in an identical manner, and that they receive identical benefits. He stated that bookkeeping, including payroll, advertising, purchasing, and warehouse functions are centralized in Tampa, and that spare trucks and equipment are located there. Insulation materials are also located at the various branches, and Respondent frequently transfers such goods from one branch to another. Finally, the trucks which operate out of

[10] See fn. 4, above.

[11] The record shows that, as a result of Respondnt's hiring of replacements, more than 15 employees were employed at Tampa on the date of the demand for recognition.

various branches return to Tampa for periodic maintenance.

In view of the evidence set forth above, and the absence of evidence that the Tampa employees retain a separate community of interest notwithstanding such evidence to the contrary, we find that a unit restricted to just the Tampa production and maintenance employees is inappropriate for the purposes of collective bargaining. Inasmuch as the Union's request for recognition was limited to a unit only of Tampa employees, we find that the request for recognition was for an inappropriate unit. The record further shows the Union has neither sought to represent, nor obtained majority status among employees in the larger unit. Accordingly, we adopt the Administrative Law Judge's dismissal of the 8(a)(5) and (1) allegations.

THE REMEDY

In view of our finding that Respondent unlawfully refused to reinstate the strikers subsequent to the offer to return made on their behalf, we shall order Respondent to offer those employees immediate and full reinstatement to the positions which they held at the time they went on strike or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges. We shall further order that Respondent make whole these employees for any loss of earnings suffered by reason of the discrimination suffered by them, by paying to each a sum of money equal to that which each would have earned as wages from the date each was entitled to reinstatement to the date on which Respondent offers or has offered reinstatement as aforesaid,[12] less net earnings, if any, during such period. Backpay and interest thereon shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[13]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Home Insulation Service, a Division of Sunstate Wholesalers, Tampa, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Asking employees about their union sentiments and desires.

(b) Threatening its employees that the Company would never allow a union in the plant.

(c) Discouraging membership in the International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, or any other labor organization, by unlawfully failing or refusing to reinstate or otherwise discriminating against its employees because they have engaged in protected strike or other concerted activity for their mutual aid or protection or because they have engaged in union activity.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Make whole the following named employees who went out on strike on May 25, 1979, in the manner set forth in the section of this Decision entitled "The Remedy":

Larry L. Hardy	Leo A. Beard
Jeffrey Scott Englin	Davis Lynn Eastburg
	Stuart T. Beach
Amiel A. Montemurro	Edward P. Glover
	John L. Huff

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Tampa, Florida, plant and its branch offices copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

[12] Whether Respondent has already made sufficient offers of reinstatement to these strikers is a matter to be left for the compliance stage of this proceeding. However, we note that, in determining whether Respondent has made a proper offer of reinstatement, a discriminatee must have been granted a reasonable period of time to consider whether to accept such offer, the length of which depends on the factual circumstances of each particular case. See *Murray Products, Inc.*, 228 NLRB 268 (1977), enfd. 584 F.2d 934 (9th Cir. 1978); *Freehold AMC-Jeep Corporation*, 230 NLRB 903 (1977).

[13] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would award interest on the backpay due based on the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[14] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Following a hearing at which the Company, the Union, and the General Counsel of the National Labor Relations Board participated and offered evidence, it has been found that we violated the National Labor Relations Act, as amended. We have been ordered to post this notice and to abide by what we say in this notice.

Section 7 of the Act gives all employees the following rights:

To engage in self-organization
To form, join, or help unions
To bargain collectively through representatives of their own choosing
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all these things.

In recognition of these rights, we hereby notify our employees that:

WE WILL NOT ask employees about their union sentiments and desires.

WE WILL NOT threaten employees that we would never allow a union in our Company.

WE WILL NOT discourage membership in International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, or any other labor organization, by unlawfully failing or refusing to reinstate or otherwise discriminating against employees because they have engaged in protected strike or other concerted activity for their mutual aid or protection or because they have engaged in union activity.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act, as amended.

WE WILL offer immediate and full reinstatement to the following employees who went out on strike on May 25, 1979, if we have not already done so, and make them whole for any loss of pay they may have suffered as a result of our discrimination against them, plus interest:

Larry L. Hardy	Leo A. Beard
Jeffrey Scott	David Lynn Eastburg
Englin	Stuart T. Beach
Amiel A.	Edward P. Glover
Montemurro	John L. Huff

Our employees are free to become or remain members of International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, or any other labor organization.

HOME INSULATION SERVICE, A DIVISION OF SUNSTATE WHOLESALERS

DECISION

STATEMENT OF THE CASE

JOHN M. DYER, Administrative Law Judge: The charge in this case was filed on May 29, 1979,[1] by the International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, referred to herein as the Union, against Home Insulation Service, a Division of Sunstate Wholesalers, referred to herein as Respondent or the Company. The Regional Director issued a complaint on July 10, which was amended on July 11, alleging violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, herein called the Act.

Respondent's answer admits the commerce and jurisdictional allegations, the status of the Union, as amended at the hearing, and the supervisory status of President English and Branch Manager McMullan but denies the commission of any unfair labor practices.

The hearing of this case took place before Administrative Law Judge C. Dale Stout in Tampa, Florida, on December 3-6, 1979. After the death of Administrative Law Judge Stout, the parties were informed of the alternative methods of concluding this case and agreed that the Chief Administrative Law Judge should appoint another administrative law judge to prepare and issue the decision on the record made before Administrative Law Judge Stout. On May 16, 1980, the Chief Administrative Law Judge notified the parties of my appointment to the case. The record demonstrates that the parties were given full opportunity to appear, examine, and cross-examine witnesses and to argue orally and that Respondent and the General Counsel filed briefs. I have carefully considered the transcript and briefs and, based on them, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Florida corporation engaged in selling and installing home insulation with its principal office and place of business in Tampa and with six other branches in Florida. During the past 12 months, Respondent purchased and received goods and materials di-

[1] All dates are in 1979 unless otherwise indicated.

rectly from outside Florida which were valued in excess of $50,000.

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Facts*

Respondent sells and installs various types of insulation principally to contractors building homes. A portion of its business consists of sales to commercial buildings and to homeowners seeking additional insulation for their homes.

The Company has been in business for 32 years and has its headquarters in a separate building in Tampa, Florida. Adjacent to the headquarters is the Tampa sales and installation office, headed, since February 1979, by Branch Manager McMullan. Also on the same property is a warehouse and a garage. About half of the employees are in the Tampa branch with the balance in branch offices in Clearwater, Sarasota, Orlando, Lakeland, Ocala, and Tallahassee. Respondent installs batts of insulation, blows in loose insulation, and, using special equipment, blows urethane foam into areas desired.

The employees involved in this case are the installers, helpers, urethane mechanics, warehousemen, and mechanics, since the parties agreed that office and clerical employees and salesmen should not be in a bargaining unit. The Charging Party would restrict a unit to the Tampa branch while Respondent asserts that a unit of all branches would be appropriate.

The employees are assigned jobs in the morning and drive assigned trucks to their jobs. The employees are paid on a piece rate basis according to the amount of insulation they install.

During May 1979, some of the employees sought the assistance of a union and employee Montemurro contacted William Langford, business agent of the Union, and on May 18 employees Glover, Eastburg, and Montemurro met with him. On the next day, Montemurro, Palmer, Glover, Beach, Eastburg, Veenstra, Huff, Englin, and Miller attended a meeting at Langford's home where he explained the benefits of a union. Authorization cards were given to Montemurro, Glover, and Eastburg on May 22. They distributed cards to other employees on May 22 and 23 and returned 12 signed cards to Langford on May 24.

B. *Events of May 25 through May 28*

On Friday, May 25, Montemurro and other employees heard McMullan tell Palmer that he was going to pay someone $5 an hour to insulate an attic. Palmer said he knew how to do it cheaper, but was not paid enough to disclose his knowledge to McMullan. McMullan said, "Well f— you," and Palmer threw his coffee on McMullan. A few minutes later, McMullan asked Palmer for the keys to his truck and his work tickets.

Montemurro, after calling Langford on the phone and telling Langford he thought Palmer was being harassed for union activity, told McMullan that he, Palmer, and Glover were the union organizing committee and that the employees had signed union authorization cards. McMullan said, "All right, I understand" and went to his office. Shortly afterwards, McMullan came back and said there was work to do if the employees wanted to do it. Palmer was called into the office and came back in about 5 minutes and told the other employees that he was fired.

Two employees, Williams and Wilcher, had reported to work and had been dispatched to their jobs prior to this time. Employee Walton was off on Friday and Monday, and employee Miller was on sick leave at this time.

The remaining eight employees decided that they would not work if Palmer could not work. Montemurro told McMullan of this decision and McMullan asked them to park their trucks and return their work tickets. Veenstra arrived late and McMullan asked if he had signed a card. Veenstra said he had, and McMullan took him to his office and terminated him. Handy, Montemurro, Palmer, Glover, Beard, Englin, Huff, Eastburg, and Veenstra went to Langford's house.

Langford testified he met with the men on Friday and said he told them they should be ready to return to work on Monday whether Respondent took Palmer back or not.

Langford testified that, after calling Respondent's office twice on Saturday, May 26, and not reaching English, on the third occasion about 1 p.m. the person answering said that English was not accepting calls. Langford told her to take a note and tell English that the employees will be there ready to work on Monday morning. (The General Counsel's brief is inaccurate in stating that Langford said that the employees who struck would be there Monday morning for work.)

Langford contacted the Union's attorneys and was with them when a mailgram was phoned in on Saturday at 7:51 p.m. At 10 p.m., Saturday night, the Union's attorney sent the same message in a telegram to Respondent. Respondent received the telegram by phone between 10 and 10:15 a.m. on Monday and received the mailgram with the mail delivery on Tuesday, May 29, since Monday was a holiday.

The messages were the same and, after claiming a majority in a P and M unit at the Tampa branch, demanded recognition and requested bargaining. It then continued:

> Additionally reinstatements and reimbursements for their lost earnings is demanded for the employees locked out on May 25. All employees will report for work and be ready to work at the normal work time of 7 AM on Monday, May 28.

Montemurro, who apparently was the spokesman for the employees, said they decided on Friday to return to work on Monday and that he called McMullan around 9 p.m. on Saturday evening and said that all 14 of them would be at work on Monday. He stated McMullan

asked, "[A]ll fourteen of you?" and, when he said yes, McMullan said, "See you Monday and no comment."

McMullan's version of this conversation differs only that in his response he says he asked Montemurro, "All 14 including Eric [Veenstra] and Jim [Palmer]?" and that Montemurro replied, "All 14."

Respondent, on Friday, May 25, and on Saturday got word out to customers, friends, and suppliers that it was struck by its Tampa employees and was immediately going to replace them with permanent employees.

A large number of applicants was interviewed and hired on Saturday and, according to McMullan and English, Respondent had a full complement of employees scheduled to report during the following week. Some employees did not report but Respondent covered the work with the help of some of its branch officers and salesmen.

Respondent claims it hired no one on Sunday, but the General Counsel produced two witnesses who testified they were interviewed and offered employment on Sunday, May 29.

An individual named Andrews testified he was interviewed and hired by McMullan on Sunday and that McMullan said the striking employees would have a big surprise on Monday because they would not have their jobs any more. Andrews testified he was sure this occurred on Sunday and not Saturday because he watched a pro football game on television. The parties stipulated that the TV listings for that day had no mention of a pro football game.

Another individual named Nick Julian testified that he got time off from his job as a cook in a restaurant on Sunday and applied for work with Respondent and was offered a job. Respondent produced a witness with Julian's timecard from the restaurant which showed that Julian was at work throughout the period and that either English or McMullan was at the office on Sunday.

It is not possible to credit either Andrews or Julian on their Sunday interviews testimony because of the obvious flaws in their testimony. Respondent's testimony that there were no interviews and hirings on Sunday, May 27, must be credited. I also dismiss the 8(a)(1) allegation concerning McMullan based on Andrews' testimony, finding Andrews not a credible witness.

On Monday, May 28, the striking employees, including dischargees Palmer and Veenstra, showed up for work at starting time. They were met at the gate by a security guard who refused them admission to the premises except to turn in their equipment and uniforms.

On Saturday, McMullan interviewed Charles Foti. Foti testified that McMullan told him about the job and asked how he felt about unions. According to Foti, McMullan said that as long as English was president and he was the manager there would be no union in the plant. McMullan told Foti that, if he wanted a job, to be there on Monday, and he replied he would let McMullan know on Sunday if he wanted to take the job. Foti did not call McMullan on Sunday and said he had a friend answer the phone on Sunday and tell McMullan he was not there.

McMullan testified that in interviewing Foti, as he did all the applicants, he explained that the Company was hiring because the former employees wanted a union and had gone on strike. McMullan said he told applicants that the Company was 32 years old and that basically, because of the strike, the Company was starting over on Monday with new help and was going to keep going and service its customers in order not to lose them. He did not recall asking Foti about his union sentiments and denied saying there would never be a union at the Company. McMullan testified that on Saturday Foti accepted the job but did not know what was going to happen on Monday and would call McMullan on Sunday.

On Foti's job application is written "will call by 3:00 PM on Sunday if he wants!"

McMullan did not recall questioning Foti about his union sentiments but did not deny Foti's specific testimony that he did so. The message written by McMullan on Foti's application appears to contradict McMullan's statement that Foti accepted the job. The message is more in keeping with Foti's testimony. In these circumstances, I credit Foti's testimony that McMullan did question him about his union sentiments and did either state or create the impression by his statements that Respondent would not have a union. I find and conclude that by such statements Respondent violated Section 8(a)(1) of the Act.

C. *The Offers To Return To Work*

The parties agree that the strike was an economic strike at its inception since charges concerning the discharges of Palmer and Veenstra were dismissed by the Regional Office. The General Counsel asserts that the strike was converted to an unfair labor practice strike when the Company continued to hire applicants on and after Sunday, May 27, despite receiving unconditional offers by the strikers to return to work. It is argued that Langford's telephone offer through the secretary to English on Saturday and Montemurro's telephonic offer to McMullan on Saturday night were unconditional offers which Respondent refused by continuing to hire applicants. The General Counsel alleges that McMullan's statement about "starting over"[2] indicates an intent to displace the strikers regardless of whether they applied for reinstatement.

In his brief, the General Counsel does not rely on the mailgram and telegram as offers to Respondent since the testimony demonstrated they were not received until Monday and Tuesday. However, the wording of the messages is helpful in understanding what the Union, Langford, and Montemurro had in mind in their other communications with Respondent. After making a demand for recognition and a request for negotiations, the messages state:

> Additionally reinstatements and reimbursements for their lost earnings is demanded for the employees locked out on May 25. All employees will report for work on May 25. All employees will

[2] McMullan denied using this phrase to applicants, stating it was used at the hearing to depict what was in his mind about hiring new employees.

report for work and be ready to work at the normal work time of 7 AM on Monday, May 28.

The second sentence cannot be considered in isolation but must be considered with the preceding one. The Union was demanding reinstatement and reimbursement for the employees; consequently, this cannot be considered as an unconditional offer to return to work.

The telephonic message of Langford is in the vein of all employees returning. As to the Montemurro-McMullan conversation, I credit the McMullan version that he specifically asked if the return-to-work offer was to include Palmer's and Veenstra's returning to work and that the answer was affirmative in Montemurro's statement, "All 14." McMullan was credited here because Montemurro's testimony of a conversation with Oliver is discredited and because McMullan's version appears more credible in the circumstances.

Additionally, we have the fact that Palmer and Veenstra were in uniform with the group outside the gate on Monday morning, ready to return to work.

Considering all these circumstances, including the original reason of the strike, I find and conclude that the offers to return to work were, insofar as Respondent was aware, conditional on Palmer's and Veenstra's reinstatement by Respondent. Therefore I do not find that the economic strike was converted to an unfair labor practice strike by the offers to return. Additionally, the evidence of Respondent's hirings on Sunday, May 27, was discredited, and there is no evidence of new hirings on or after Monday, May 28.

The Union, on June 20, sent a telegram making it clear that the employees were unconditionally requesting reinstatement. The hiring of employees who were to report on a later date is permissible and does not indicate that these were late hirings.

Therefore, the 8(a)(3) allegations of this case must be dismissed.

Respondent introduced evidence that offers of reinstatement were made to the strikers, that some strikers responded and returned to work, and that some did not. We do not have any *Laidlaw*-type questions to answer and will not endeavor to do so. (*The Laidlaw Corporation*, 171 NLRB 1366 (1968).)

D. *The Refusal-To-Bargain Question*

There is agreement that Respondent received the Union's telegram on Monday, May 28, and its mailgram on May 29, which both demanded recognition and requested negotiations. Respondent takes the position that an overall unit of its branch offices installation employees is proper and that the Tampa branch is not appropriate for collective bargaining.

Of the 12 card signers, Palmer and Veenstra cannot be counted. From the remaining 10, Williams returned to work on Monday, and Walton returned to work on Tuesday. Miller, who signed a card on May 24, was on sick leave due to an industrial accident involving a compensation case.

From Respondent's list of employees on the Tampa payroll starting Monday, May 28, three employees are from the Sarasota branch and Berry Oliver is the sole employee from the Lakeland branch. If we exclude them and individuals such as Algire and Gibbs, concerning whom the General Counsel had some reservations, there are still 17 other employees listed on the Tampa payroll for whom there are no authorization cards.

Adding the 7 strikers to Miller, Walton, and Richards, we have a total of 10 authorization cards for 27 employees, since at that point both those on the payroll and the economic strikers would have a voice in determining whether there would be a bargaining agent.

Thus, even accepting the Union's requested Tampa unit, the Union would not have a majority as the situation existed on Monday, May 28, or Tuesday, May 29.

With the factors of common wages and working conditions, centralized payroll and labor relations authority, interchange of workers among the branches, etc., it would appear that an overall unit of installers, helpers, warehousemen, and mechanics of all the branches would constitute the appropriate unit.

Adding the 22 individuals in those offices (excluding Oliver in Lakeland) to the Tampa figures would leave the Union representing less than a fourth of the employees.

I find and conclude that under the circumstances the Union did not represent a majority of Respondent's employees in an appropriate unit and, accordingly, dismiss the allegation of an 8(a)(5) violation.

E. *The Additional 8(a)(1) Allegations*

Montemurro testified that, on May 26, Berry Oliver, Respondent's sole employee in Lakeland, Florida, telephoned Montemurro at his parents' home and told him the employees were needed on the job. Oliver reportedly told Montemurro that English had said there would not be a union in the Company as long as he was there. Montemurro said he told Oliver the employees would return to work Monday.

Oliver denied calling Montemurro or that he told Montemurro that English had stated there would not be a union at the Company.

Respondent produced Oliver's telephone bill for the relevant period which showed no such long-distance call. Respondent also produced telephone bills for Montemurro's parents' telephone which showed long-distance calls being placed from that telephone to Oliver's telephone on May 26 and May 31, the first lasting about 35 minutes and the second 3 minutes.

Independent of the question of whether Oliver was a supervisor or an agent of Respondent, I have concluded that Montemurro should not be credited. His explicit testimony was contradicted by independent credible evidence, and I will dismiss the 8(a)(1) allegation concerning Oliver.

During the week following the start of the strike, employee Englin returned a gas can to Respondent and had a conversation with English. Although stating he did not recall the specific words, Englin said English asked what the employees wanted since they had received a raise and gotten the profit sharing straightened out and added that "there was no way there would be a union."

English denied stating that "there was no way there would be a union" at Respondent's. He did admit that he had talked to a number of his customers and specified three who told him that, if the Company went union, they would look for another insulation contractor. Based on those conversations, English says he told Englin that he thought it would be detrimental to the Company to have a union.

Since Englin testified that his recollection of the conversation was not specific as to English's statements, I am unable to determine that English made the asserted statements. What is likely in this circumstance is that Englin interpreted English's resistance to a union and perhaps a comment on what the contractors might do to reach his conclusion as to what English meant.

Under these circumstances, I cannot find that English made the specific threat and, consequently, must dismiss that allegation of the complaint.

Employee Russ Miller, who was on sick leave from an industrial accident, went to Respondent's office on May 30 concerning some Workmen's Compensation papers. He testified that McMullan asked whether he would have been on the picket line if he had not been hurt. Miller said he did not know. McMullan then asked if he would be with the strikers when he did come back. Miller said he hoped the strike would be over when he came back. McMullan then said there was no union there and there would never be one.

McMullan testified that, after some sparring as to what each of them thought of the situation there, Miller said he thought they were going about it all wrong and should put their trust in God. McMullan was not asked to specifically deny Miller's testimony and gave only this version of it. In essence, he does admit asking Miller what he thought about the situation.

Respondent's brief claims that Miller should not be credited since in his affidavit to the National Labor Relations Board he attributed the opening statement to employee Gibbs. However, the transcript containing that part of the affidavit shows that McMullan asked Miller what he was going to do when he was able to come back and, to Miller's answer that he hoped it was over, McMullan persisted by asking what he was going to do if the strike were not over. Rather than shaking Miller's credibility, the affidavit appears to strengthen it. The affidavit also contains the statement attributed to McMullan that there would not be a union at the plant.

There appears nothing to impinge Miller's credibility, while I have discredited McMullan previously in regard to the Foti conversation. The subject of what Miller would do on his return to the Company apparently was one of some interest to McMullan, and I credit Miller's version of this testimony. Accordingly, I conclude and find that Respondent violated Section 8(a)(1) of the Act by McMullan's inquiries and threat.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, as set forth in section II and therein found to constitute unfair labor practices in violation of Section 8(a)(1) of the Act, occurring in connection with the business operations of Respondent, as set forth in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. THE REMEDY

Having found that Respondent engaged in the unfair labor practices as set forth above, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by:
(a) Asking employees about their union sentiments and desires.
(b) Threatening its employees that the Company would never allow a union in its plant.

[Recommended Order omitted from publication.]